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STUDENT ATHLETES AND DRUG TESTING

DONALD CROWLEY*

When the Supreme Court announced in 1989 that government mandated drug testing of some employees was constitutional even in the absence of any reason to believe that these employees had used drugs, they seemed to clear the way for more extensive testing at the federal, state, and local levels.¹ The use of drug testing as a tool to deal with perceived increases in the use of drugs has been supported by three consecutive presidential administrations, numerous editorial columnists, and apparently public opinion.² This decision left unclear whether drug testing could be required from those not involved in positions linked to public safety. For this reason, the extent to which drug testing could be instituted by public schools, colleges, and universities for their student athletes remained open to debate. The Court's recent decision involving athletes in an Oregon public school only partially answers the relevant questions. This Article will analyze the issues and recent judicial activity of particular relevance to this subject.

While public opinion appears to be generally supportive of drug testing of student athletes, by the late 1980s few school districts had undertaken this approach. In 1986 the National Collegiate Athletic Association (NCAA) provided a major boost for testing when, as part of its program of drug education for athletes, it instituted a program for drug testing of players involved in championship events.³ The Association has discussed expanding this policy to include testing on a more regular basis, but at this point drug testing of athletes in non-championship events remains limited to testing football players for the use of ster-

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1. The Court announced its views on drug testing in two 1989 decisions, *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989), and *Skinner v. Railway Labor Executives Ass'n.*, 489 U.S. 602 (1989).

2. See, for instance, poll done by Gallup for Newsweek, Aug. 11, 1986. Also see NBC News-Wall Street Journal Poll in *National Journal*, Feb. 25, 1989. Over the last several years roughly 80% of incoming College Freshman have supported the use of drug testing by employees. For the most recent survey, see *THE CHRONICLE OF HIGHER EDUCATION ALMANAC*, Sept. 1, 1995, at 17.

3. For a general review of the program and rules pertaining to the NCAA's drug testing policy, see 1994-1995 NCAA DRUG-TESTING EDUCATION PROGRAMS BROCHURE.

oids. The Association has also encouraged member institutions to develop their own program for drug testing and many have done so.⁴

The constitutionality of the NCAA's drug testing policies has not been heard by the U.S. Supreme Court, although the issue has been dealt with by several federal and state courts.⁵ The constitutional issues presented by the NCAA's policies are related to, but slightly more complex than, the issues raised when the testing is conducted by a public university. When a public university requires drug testing it is clearly acting as a government agent and subject to whatever state and federal constitutional limits are held to apply. However, when the NCAA engages in drug testing, the issues are even more perplexing due to the ambiguous status of the NCAA. If the NCAA is regarded as a private association, then it is not subject to the same constitutional limitations that apply to public universities. Thus, in the absence of statutory restrictions the NCAA may engage in drug testing of college athletes at its discretion.⁶ However, if the NCAA is a state actor, or at least sufficiently intermingled with state actors so as to be classified as one, then federal constitutional requirements do apply. Even if the NCAA is regarded as a state actor, it could still engage in drug testing that satisfies Fourth Amendment standards.

I. THE NCAA DRUG TESTING POLICY

At its annual convention in 1986, the NCAA adopted a policy requiring that student-athletes submit to a urinalysis prior to participation in any championship or NCAA certified post season events. The urinalysis would be conducted for a long list of banned drugs, including street drugs and anabolic steroids.⁷ The NCAA adopted this policy with the stated intent of insuring that "no one participant might have an artificially induced advantage, so that no one participant might be pressured

4. *Id.* at 16.

5. See *Hill v. NCAA*, 273 Cal. Rptr. 402 (Cal App. 1990); 865 P.2d 633 (Cal. 1994); *O'Holloran v. University of Washington*, 856 F.2d 1375 (9th Cir. 1988).

6. Some state constitutions, like California's, have provisions that have been held to apply to private actors as well as public actors. See *Hill v. NCAA*, 865 P.2d 633 (Cal. 1994). Other states have passed civil rights statutes which might provide grounds for limiting NCAA actions with regard to drug testing. However, in *Bally v. Northwestern University*, 532 N.E. 2d 49 (Mass. 1989), a Massachusetts Court refused to apply the Massachusetts Civil Rights Act in such a manner. Also, those seeking to assert a violation under section 1983 of the 1871 Civil Rights Act are likely to meet the same barriers since they must prove that the NCAA acted under "color" of state law.

7. See NCAA DRUG TESTING/EDUCATION PROGRAMS, *supra* note 3, at 10.

to use chemical substances in order to remain competitive, and to safeguard the health and safety of participants”⁸

Athletes at universities participating in NCAA sponsored events have no choice in submitting to testing, at least not if they wish to continue playing in intercollegiate athletic events. At the beginning of each school year, every athlete is required to sign a consent form agreeing to the NCAA’s drug testing procedure. Failing to sign the form on a yearly basis automatically results in being declared ineligible for all athletic competition.⁹ Interestingly, the penalty for refusing to sign the consent form is more unforgiving than the drug testing program itself. Under current regulations, an athlete who tests positive for any drugs on the banned list will remain ineligible for one year but can be reinstated after a year if a clean drug test is obtained.¹⁰

The school’s role in the NCAA’s program is pervasive. Even though the testing is conducted by the NCAA at NCAA approved laboratories, the school obtains the players’ signatures on the consent forms and is responsible for informing the players of the rules. If a player tests positive, the school is first informed and if an appeal is desired, it must be filed by the school. Finally, if the appeal fails, the school must suspend the player or it will be subject to further NCAA penalties.¹¹

Although separate from the policy described above, the NCAA has also encouraged member institutions to develop their own drug testing programs and supplies suggested guidelines on the procedures that should be followed.¹² Indeed, there is a reasonable amount of pressure for a major school to do so, lest they have players who test positive at the most inopportune time, immediately prior to a championship event. As a result, most division one schools have established some form of drug testing program.¹³

There is little doubt that the programs are popular. According to a Michigan State University study conducted for the NCAA, sixty-four percent of the American public supported the use of drug testing for

8. *Id.* at 6.

9. *Id.* at 8. Not unlike loyalty oaths such consent forms punish those who as an act of conscience refuse to sign them. However, a track star (for example) using steroids during the summer but not likely to participate in any NCAA championship meets until the late Spring would have over half a year to either stop taking the steroids and/or find a way to mask them.

10. *Id.* at 9.

11. *Id.* In particular the school will forfeit any post season game in which it knowingly played someone who tested positive for a banned drug. This includes forfeiting any proceeds from the event.

12. *Id.* at 16.

13. See 1990 NCAA DRUG EDUCATION AND DRUG TESTING SURVEY, § 5.

college athletes.¹⁴ Interestingly, the public's perception of the extent of the problem is not consistent with the data on general usage by athletes. According to the Michigan State study, student athletes' use of drugs fell between 1985 and 1989. In this same period, public and even the athletes' perceptions of a drug problem in college sports increased.¹⁵

The support for drug testing notwithstanding, its effectiveness is open to considerable debate. Since the program was started in 1986, less than one percent of the athletes have tested positive.¹⁶ Some have argued that this low number demonstrates that testing is having a deterrent effect, but without baseline data for comparison, it is more of an assumption than a demonstrable fact.¹⁷ If drug use was low and a drug testing program therefore resulted in few positive tests, this would hardly be evidence of a deterrent effect. The Michigan State study does suggest a general decline in the use of some illegal drugs (particularly cocaine and marijuana) between 1985 and 1989 with further declines recorded in the

14. See REPLICATION OF THE NATIONAL STUDY OF THE SUBSTANCE USE AND ABUSE HABITS OF COLLEGE STUDENT ATHLETES (conducted by the College of Human Medicine, Michigan State University (Oct. 1989)). This study involved a questionnaire sent out to over 2,000 student athletes and like most studies of its kind does not necessarily measure drug use as much as it measures admitted drug use and stated attitudes.

15. According to the Michigan State Study, support by athletes for drug testing increased from 48% to 62% in the period while the survey indicated a decline in use in most categories. Interestingly, the athletes perception that drug use was a problem increased in the period. Whether this was because of increased media and public attention to the issue or other factors is unclear. This apparent inconsistency is similar to data on perceptions of crime discussed by STUART SCHEINGOLD, *THE POLITICS OF LAW AND ORDER* (1984).

16. There has been a marginal downward trend since 1.2% tested positive in 1987. In the Fall of 1993 only 0.3% tested positive. In the Fall of 1994 0.8% tested positive, most for marijuana. See CHRONICLE OF HIGHER EDUCATION, June 6, 1990, at A32; *Possible Drug-Test Rate Increased During 1994*, NCAA NEWS, June 14, 1995, at 1 and 16.

17. Evidence of a deterrent effect cannot be demonstrated on the basis of the number of positive tests obtained since the program began. One article accused a California trial court judge of engaging in circular reasoning because he concluded that the NCAA statistics showed no deterrent effect from the testing. According to this author, "it does not require a great leap of logic to conclude that the reason there is little evidence of drug use is because of the regulatory efforts, not despite them." David Cochran, *The Privacy Expectation: A Comparison of Federal and California Constitutional Standards for Drug Testing in Amateur Athletics*, 17 HASTINGS CONST. L. Q. 533, 548-49 n.136 (1990). Actually, it does require a great leap of logic. Unless one has baseline data demonstrating the level of use before testing (or there is a substantial decline in the number of positive tests) it is simply an unproven assumption to conclude that the testing has had a deterrent effect. The author quoted above seems to assume that any time a regulatory effort is undertaken and noncompliance is found to be low then the program must be working. Before this is a reasonable conclusion one needs to know what the noncompliance rate was before hand, otherwise it is possible that the problem was simply overstated to begin with. In this case it is also possible that the tests are not ascertaining the actual number of those who use drugs.

most recent 1993 survey.¹⁸ However, this decline is roughly similar to the drop in the use of illegal drugs documented by other national surveys.¹⁹ To attribute the decline in illegal drug use by college athletes to drug testing while ignoring other cultural messages that might also have accounted for such a decline is highly questionable. Interestingly, the Michigan State study shows that in the 1985-1989 period the use of anabolic steroids did not decline, but marginally increased among football players. By 1993 the overall use of steroids had dropped among male athletes but showed "considerable increases" in reported steroid use among female athletes.²⁰ Since the use of steroids is most readily associated with the NCAA's stated goal of insuring fair competition, this is further reason to doubt the effectiveness of the NCAA's program.²¹

Apart from the deterrence argument, drug testing also raises troubling questions about accuracy and personal privacy. Given the range of drugs for which the NCAA seeks to test and the difficulties inherent in drug testing in general, the testing program cannot avoid the possibility of false positives.²² Indeed, even eating a poppy seed muffin might result in a person testing positive for opiates. Although the NCAA spends over a million dollars a year and employs what are generally considered to be the most reliable methods available, it still is unable to avoid mak-

18. See 1989 Michigan State Study, *supra* note 14, at Table 7; SECOND REPLICATION OF A NATIONAL STUDY OF THE SUBSTANCE USE AND ABUSE HABITS OF COLLEGE STUDENT ATHLETES, Figure 4 (NCAA 1993).

19. See NATIONAL SURVEY ON DRUG ABUSE (published by the National Institute on Drug Abuse).

20. The 1989 survey showed a marginal but statistically insignificant increase of reported steroid use among football players. The 1993 survey showed a drop from 9.7 to 5% for football players. All other sports were lower than this. Even though the authors of the study described the use of steroids by women athletes as having undergone a "considerable increase" it should be pointed out that women track and tennis participants reported the highest usage at 2.7%.

21. While the scientific evidence on whether steroids actually enhance performance isn't terribly persuasive the Michigan State studies suggest that this is the primary reason they are used. The 1989 study found that 82% used steroids to improve performance and 18% to recover from an injury. In the 1993 study these numbers were 65% and 21% respectively. See Table 15 of the 1989 study and Table 10 of the 1993 study. It is also interesting to note that less than 2% of the athletes surveyed stated that they didn't use steroids because of the fear of getting caught.

22. The predictive ability of drug testing depends upon a wide range of factors and in some cases carries a high possibility of false positives. See, Wells, Halperin, & Thun, *The Estimated Predictive Value of Screening for Illicit Drugs in the Workplace*, AM. J. OF PUB. HEALTH, July 1988, at 817-19. According to the 1993 Michigan State Study, 18.6% of those tested stated that "they, or one of their teammates had 'beaten' one of their school's drug tests." (p.13). This suggests that there may also be a false negative problem but it also raises further questions about deterrence.

ing determinations about the presence of some banned drugs that, in the words of one of their own doctors, is simply an "educated guess."²³ One court even concluded that "students can be declared ineligible under the NCAA program for merely passively inhaling marijuana smoke in a room."²⁴ While the questions about the effectiveness of drug testing are important, they have not been a central issue when addressing the constitutionality of such programs. The first major hurdle that must be passed if someone intends to challenge the constitutionality of the NCAA's policies involves the status of the NCAA as a state actor.

II. THE STATE ACTION DOCTRINE

The state action doctrine ranks as one of the more illusive doctrines of constitutional law. As an abstract concept it is fairly easily explainable, but its application to actual situations is much more problematic. As a concept of federal constitutional law, the doctrine applies to the notion that constitutional rights act as restrictions on government actors but not private individuals, businesses, or groups. Thus, the ban against unreasonable searches restricts government intrusions into one's personal effects, but does not limit the ability of a snoop neighbor to investigate your basement activities. While the neighbor might be subject to a trespassing charge, he cannot be held to have violated the Fourth Amendment. The state action doctrine is most often associated with the passage of the Fourteenth Amendment. When the post Civil War Congress passed an extensive Civil Rights bill that limited the actions of many private businesses and individuals, the Supreme Court claimed that since the Fourteenth Amendment was addressed to state actors only, Congress did not possess the power to limit the discriminatory practices of private businesses and individuals. "Individual invasion of individual rights is not the subject-matter of the amendment. It does not authorize congress to create a code of municipal law for the regulation of private rights; but to provide modes of redress against the operation of state laws, and the action of state officials"²⁵

This interpretation of the limits of the Fourteenth Amendment and the necessity of finding state action before constitutional rights can be vindicated has remained settled judicial doctrine.²⁶ What has baffled the

23. See *Hill v. NCAA*, 273 Cal. Rptr. 402, 415 (1990)(quoting testimony of an NCAA doctor).

24. *Id.*

25. *The Civil Rights Cases*, 109 U.S. 3 (1883).

26. Dissenting in the *Civil Rights Cases*, Justice Harlan claimed that private property became "clothed with a public interest" when used in such a way as to "make them of public

Court, as well as its legions of commentators, is determining what degree and type of state action is allowable. As one commentator put it, "State action is a sea in which everything else floats. For this reason constitutional theorists often conclude that the question is seldom whether there is state action but whether the obvious state action (including obvious state inaction) is acceptable."²⁷ The problem has been made both more crucial and more difficult to answer as government has come to participate in, regulate more, and engage in more activities with private businesses and associations. Indeed, a restrictive or narrow reading of what constitutes state action may make it possible for government, in concert with private actors, to accomplish indirectly what it cannot constitutionally do directly.

In an era of "privatization" in which government agencies are finding it increasingly desirable to contract out for the performance of certain services, it is even more important to recognize that achieving the benefits of market efficiency should not be obtained at the cost of protecting the basic rights of citizens. As Justice Brennan once observed with relation to providing medical care for prisoners, while "[t]he Government is free . . . to privatize some functions it would otherwise perform . . . , such privatization ought not automatically release those who perform Government functions from constitutional obligation."²⁸

There are important reasons for maintaining the requirement that state action must be present before constitutional rights apply. A claim that constitutional provisions apply to all situations irrespective of the presence of government action would have a variety of undesirable effects, particularly in regard to protecting the availability and possibility of maintaining truly private associations and the liberties that are given meaning and substance by such associations. However, given the degree to which government is increasingly interlocked and intertwined with private groups, it is necessary to recognize the need for a fairly broad view of what constitutes state action. A broad view would recognize that when government acts in concert with private groups, there is a particular need to protect the rights of individuals who otherwise might be powerless against the coercive power of large organizations. As one legal scholar put it:

consequence." While the analogy is imperfect, clearly the activities of the NCAA are of public consequence and have thus become "clothed with a public interest." *Id.* at 42.

27. C. Edwin Baker, *Private Power, the Press, and the Constitution*, 10 CONST. COMMENTARY 422, 422 (1993).

28. *San Francisco Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 560 (1987) (Brennan, J., dissenting).

The emphasis on the government's power is not meant to suggest that state action should be limited only to direct government acts. In fact, recognizing the pervasiveness of government's reach perhaps argues most strongly for a broad definition of state action, sensitive to the many ways the state can influence, directly or indirectly, private behavior.²⁹

Despite such warnings, the current Supreme Court has not taken a broad view of state action. Indeed, they have taken a very narrow and rather formalistic view of when private actors are considered to be acting in concert with the state. Reversing a Warren Court trend toward a more expansive concept of state action, the Burger Court and the Rehnquist Court have increasingly demanded greater demonstrations of state involvement before the state action requirement is fulfilled.³⁰ As developed throughout the mid-twentieth century, the Court settled on two general tests to help determine the necessary degree of state action. First, if the function performed by the private actor was one that had been traditionally performed by government, then the private action could be seen as public.³¹ A second approach, the state involvement test, examines whether the state's involvement with the private party has been so pervasive that it significantly facilitates or supports the challenged actions of the private party.³²

While these general tests appear reasonable, they are, like all Supreme Court tests, capable of being pulled or stretched in various directions. Those favoring a broad reading of state action might find that any amount of government aid to a private party constitutes state involvement. In contrast, those wishing to limit the state action doctrine could easily insist that only a few functions are traditionally governmental and only the most direct type of governmental control can constitute state involvement. Further, those wishing to limit the scope of judicial activity might well argue that the tenets of judicial restraint demand that the Court interpret the state action doctrine narrowly, thus leaving disgruntled individuals only very limited means of challenging supposedly private authority. Whether to limit the reach of constitutional rights, or to limit the involvement of the federal judiciary, the Burger and Rehn-

29. Scott Sundby, *Is Abandoning State Action Asking Too Much of the Constitution?*, 17 HASTINGS CONST. L.Q. 139, 143 (1989).

30. See Hala Ayoub, *The State Action Doctrine in State and Federal Courts*, 11 FLA. ST. U.L. REV. 893 (1984); Henry Strickland, *The State Action Doctrine and the Rehnquist Court*, HASTINGS CONST. L.Q. 587 (1991).

31. Ayoub, *supra* note 30, at 895.

32. *Id.* at 896.

quist Courts have tended toward an extremely narrow interpretation of the state action doctrine.

In three decisions in 1982 the Burger Court used variations of the tests described above to limit the reach of the state action doctrine. While still asserting that state action can only be found if the private entity has exercised powers that are "traditionally the exclusive prerogative of the state," the Court has been noticeably reluctant to hold that private actors are performing such functions.³³ By emphasizing the notion of exclusivity, the Court is not inclined to find very many actions that meet this requirement. In a similar vein, the Court argued that the state involvement test can be satisfied only if the actions of an otherwise private actor are "fairly attributable" to the state.³⁴ While this would not appear to be much of a shift in emphasis, the Court has indicated that before a deprivation of a right can be "fairly attributable" to the state, it must be demonstrated that a private party charged with a rights violation "acted together with or has obtained significant aid from state officials."³⁵

III. THE NCAA AS A STATE ACTOR

The importance of this brief overview of the state action doctrine to the NCAA's drug testing policies should be apparent. If the NCAA is considered a state actor under the Fourteenth Amendment, then a wide variety of constitutional protections, including the Fourth Amendment's protection against unreasonable search and seizures, become available to those who are affected by their actions. Thus, the central issue becomes the classification of the NCAA. The NCAA is a voluntary athletic association that has always been closely connected to public institutions. It was formed in the early part of the twentieth century after President Theodore Roosevelt called two White House conferences to encourage reform in college football.³⁶ The Association has gradually grown in members, power, prestige and wealth. Today it consists of 906 member schools active in one of the three levels of athletic competi-

33. *Blum v. Yaretsky*, 457 U.S. 991, 1005 (1982) (citing *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 353 (1974)).

34. *Lugar v. Edmondson Oil Co.*, 457 U.S. 830, 937 (1982).

35. *Id.* The Court's notion of what constitutes significant aid is apparently quite stringent since they found that the actions of a private school for maladjusted students were not fairly attributable to the state even though the state contributed 90% of the school funds and was responsible through referrals for most of the schools students. See *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982).

36. GLENN M. WONG, *ESSENTIALS OF AMATEUR SPORTS LAW* 107 (1988).

tion.³⁷ Over half of the members are public institutions. The structure of the NCAA is complex but the principal administrative body is a forty-six member committee known as the NCAA Council. The majority of the Council is made up of athletic directors from member institutions. The Council's decisions can be checked by a majority vote of the delegates at the annual convention. There is also a President's Commission, which is made up of forty-four Chief Executive Officers elected from the general membership. In recent years this body has sought to exercise more policy making control over the athletic director dominated Council. As the President of the University of Iowa commented after successfully passing several reform measures:

Contrary to the president's own expectations, our control of the NCAA was relatively simple to assert and, once established, nearly absolute. But this should not have surprised anyone, because the NCAA is its member institutions, and they are run by presidents. Narrow athletic interests are powerless in the face of presidential will and consensus.³⁸

While the power struggle between presidents and athletic directors is interesting what is clearly more important is that the majority of both the Council and the President's commission are representatives of public universities.³⁹ The connection between the NCAA and public institutions is not simply limited to questions about membership and who exercises control. Money is an important, some would say essential part of the relationship.⁴⁰ The financial ties run in both directions. The NCAA receives dues from its member institutions while many Division I schools find the money returned from championship events like the NCAA basketball tournament and major bowl games to be crucial to stemming the red ink in many major athletic programs.⁴¹

A third factor which tends to intertwine public institutions and the NCAA is the fact that as long as public universities stay members, NCAA rules are binding on them. Thus, whether the issue is eligibility of students, drug testing policies, or recruitment of students-athletes, the NCAA's interpretation of the rules and facts of any dispute are binding

37. See 1993-1994 NCAA DIRECTORY.

38. Hunter T. Rawlings, *Why did We Take So Long?*, SPORTS ILLUSTRATED, Jan. 21, 1991, at 72.

39. My compilation of the institutional affiliation of members of the Council and President's Commission. See 1993-94 NCAA DIRECTORY.

40. See generally MURRAY SPERBER, COLLEGE SPORTS, INC. (1990).

41. As Sperber argues such payments rarely result in balancing the athletic department budget but the drive for the pot of gold continues unabated. See *id.* at 42-48.

on the institution. The NCAA operates on the principle of institutional control. This means that the association does not punish a coach or athlete directly, but instead it requires the school to do so. If the school chooses not to enforce an NCAA ruling, it can be put on probation or banned from NCAA competition entirely. Thus, membership in the Association puts universities in the position of ceding a significant degree of their rulemaking authority over athletes to an outside agency. From a constitutional perspective, this would not be so problematic if the outside agency was also required to satisfy basic constitutional protections.

Prior to the 1980s, most courts found the NCAA to be a state actor. Indeed, in the 1970s five different federal appeals courts found NCAA actions to be sufficiently intertwined with public institutions to require constitutional scrutiny.⁴² These courts generally noted the interlocking relationships stemming from funding, membership, and rulemaking in concluding that NCAA actions were tantamount to state action and thus must adhere to constitutional provisions. Even though no particular state or government body is in sole control of the NCAA, one federal court noted that it would be a "strange doctrine indeed to hold that the states could avoid the restrictions placed upon them by the Constitution by banding together to form or to support a 'private' organization to which they have relinquished some portion of their governmental power."⁴³ In two other cases, federal appeals courts even held that NCAA rules, when applied to private schools, constituted state action within the meaning of the Fourteenth Amendment because the degree of entanglement between the NCAA and public institutions had led to a "symbiotic relationship between public and private entities which triggers constitutional scrutiny."⁴⁴

IV. A STRANGE DOCTRINE

Apparently reacting to the Burger Court's more restrictive view of the state action doctrine, federal courts in the 1980s became less inclined to conclude that the NCAA was a state actor. This shift certainly was not brought about by any change in the nature of the NCAA or its relationship to public universities. Indeed, in the 1980s the NCAA contin-

42. See James Arslanian, *The NCAA and State Action: Does the Creature Control its Master?*, 16 J. CONTEMP. L. 333, 335-38.

43. *Parish v. NCAA*, 506 F.2d 1028, 1033 (5th Cir. 1975).

44. Arslanian, *supra* note 42, at 337. See also *Howard University v. NCAA*, 510 F.2d 213 (D.C. Cir. 1975); *Regents of the University of Minnesota v. NCAA*, 560 F.2d 352 (8th Cir. 1977).

ued to prosper as the association grew to over \$100 million in yearly revenues, and university athletic departments looked ever more fondly on achieving post season success.⁴⁵ Nevertheless, in 1984, a federal appeals court accurately anticipated the U.S. Supreme Court's future direction by holding in *Arlosoroff v. NCAA* that the "indirect involvement of state governments" was not sufficient to "convert what otherwise would be considered private conduct into state action."⁴⁶ To this court the notion that challenged action must be "fairly attributable" to the state meant that it must be demonstrated that public universities were solely responsible for the NCAA's policies. Since it had not been shown that "representatives of the state institutions joined together to vote as a bloc to effect adoption of the Bylaw over the objection of private institutions," the Court concluded that one could not reasonably conclude that the NCAA was a state actor.⁴⁷

Given the fact that *Arlosoroff* dealt with a challenge to a private university (Duke) carrying out NCAA regulations, one still could have argued that when a public university seeks to enforce NCAA rules it must operate under constitutional constraints. However, even this potential distinction became meaningless when the U.S. Supreme Court ruled on the case of Jerry Tarkanian, basketball coach at the University of Nevada-Las Vegas.

The Tarkanian case involves a rather convoluted set of facts that lend themselves to a variety of interpretations. The essentials of the story are that the NCAA engaged in a lengthy investigation of Tarkanian's basketball program at UNLV and eventually concluded that the school had committed thirty-eight infractions, including ten directly attributable to Coach Tarkanian.⁴⁸ Of these ten, the most serious was the claim that Tarkanian had attempted to frustrate the investigation by concealing information and seeking to get others to change their testimony.⁴⁹ Tarkanian was allowed a hearing before the Infractions Committee, although Tarkanian argued that the proceedings fell short of due process standards. As one legal scholar summarized Tarkanian's hearing, "The NCAA's evidence consisted solely of two enforcement staff investigators' oral recollections of interviews with individuals concerning their knowledge of alleged NCAA rule violations by Coach Tarkanian. Those

45. The NCAA's phenomenal growth continues. Its projected budget for 1995 is \$225 million. See NCAA News, July 19, 1995, at 1.

46. *Arlosoroff v. NCAA*, 746 F.2d 1019, 1021 (4th Cir. 1984).

47. *Id.* at 1022.

48. *NCAA v. Tarkanian*, 109 S. Ct. 454 (1988).

49. *Id.* at 459.

'informants' were not present to give testimony nor to be cross-examined."⁵⁰ After the hearing, the Infractions Committee's final report recommended that UNLV remove Coach Tarkanian from the athletic program for two years.⁵¹

UNLV and the Nevada Attorney General conducted their own investigations and obtained evidence at odds with the NCAA's conclusions.⁵² Despite the fact that UNLV was critical of the NCAA procedures and many of its findings, the school concluded that their membership agreement with the NCAA obligated them to accept the NCAA's findings. Thus, after losing an appeal before the NCAA, the University decided that it had no alternative but to enforce the proposed sanctions against Tarkanian.⁵³

The day before the sanctions were to take effect, Tarkanian filed suit against the University claiming that his due process rights had been violated. Although Tarkanian initially won, the case was ultimately retried with the NCAA as a party to the suit. Tarkanian won again.⁵⁴ As the Nevada Supreme Court saw the relevant issues, the NCAA was a state actor on two grounds. First, Tarkanian was a public employee (with tenure) and disciplining "public employees is traditionally the exclusive prerogative of the state."⁵⁵ Second, the court argued that "by delegating authority to the NCAA over athletic personnel decisions and by imposing the NCAA sanctions against Tarkanian, UNLV acted jointly with the NCAA."⁵⁶ Since the NCAA was considered to be a state actor, the court argued that its procedures had violated Tarkanian's Fourteenth Amendment rights to due process.

When the NCAA appealed to the U.S. Supreme Court, the Rehnquist Court was given another opportunity to narrow the reach of the state action doctrine. In a five to four decision, the majority rejected the way the Nevada Court had framed the issues. From the perspective of the Court, this case was uniquely different from other state action cases, which typically involve a private party taking steps that harm an individual. In a typical case raising the state-action doctrine, the "question is whether the State was sufficiently involved to treat that decisive conduct

50. Arslanian, *supra* note 42, at 342.

51. *Id.*

52. *Id.*

53. UNLV's other options were either to pull out of the NCAA or to refuse the penalties against Tarkanian and risk the probability of stiffer sanctions against the program itself.

54. Arslanian, *supra* note 42, at 344.

55. NCAA v. Tarkanian, 741 P.2d 1345, 1348 (Nev. 1987).

56. *Id.* at 1349.

as state action.”⁵⁷ This is of course exactly how Tarkanian and the Nevada Supreme Court perceived the case. However, Justice Stevens, for the Court’s majority, believed that “these contentions fundamentally misconstrue” the facts.⁵⁸

To the Court, the relevant fact was that the NCAA did not directly impose penalties on Tarkanian; it only threatened to impose sanctions on the school if it did not suspend Tarkanian. Indeed, the NCAA could not directly suspend Tarkanian since the only direct authority it possesses is against the member institution itself. Second, UNLV had other options to suspending Tarkanian, as it could have accepted greater penalties against the school or opted out of the NCAA.⁵⁹ Third, the NCAA and UNLV could not have acted jointly since UNLV had opposed most of the actions of the NCAA.⁶⁰ Finally, the NCAA cannot be considered to have acted under color of Nevada law because the vast majority of NCAA members reside outside the state. Indeed, the Court seemed to argue that because the NCAA was independent of the control of any state it could not be considered a state actor.⁶¹ Given this understanding of the relevant facts and concepts, the Court concluded that since the NCAA was not a state actor they could not have violated Tarkanian’s due process rights—only UNLV could have.

It would be ironic indeed to conclude that the NCAA’s imposition of sanctions against UNLV . . . is fairly attributable to the State of Nevada. It would be more appropriate to conclude that UNLV has conducted its athletic program under color of the policies adopted by the NCAA, rather than that those policies were developed and enforced under color of Nevada law.⁶²

V. THROUGH THE LOOKING GLASS

To use the Court’s own metaphor, since the Tarkanian case “uniquely mirrors” a typical state action case it was necessary “to step through an analytical glass to resolve” it.⁶³ Inadvertently, this was a metaphor that Lewis Carroll would have found appropriate. The Court seemed at great

57. NCAA v. Tarkanian, 109 S. Ct. 454, 462 (1988).

58. *Id.*

59. According to Justice Stevens’ UNLV could have simply opted out of the NCAA. From his perspective the fact that UNLV’s options “were unpalatable does not mean that they were nonexistent.” *Id.* at 465.

60. Justice Stevens argues that by not appealing the Nevada Supreme Court decision the University had scored a “total victory.” *Id.* at 460.

61. *Id.* at 462.

62. *Id.* at 466.

63. *Id.* at 462.

pains to isolate the case from its apparent context and thus reach a conclusion at odds with the underlying purpose of the state action doctrine itself. As the Court explains it: "Careful adherence to the 'state action' requirement preserves an area of individual freedom by limiting the reach of federal law" and avoids the imposition of responsibility on a State for conduct it could not control.⁶⁴

By seeing the case through its self imposed "analytical looking glass" the Court narrowed the range of individual freedom by limiting the reach of constitutional rights and made a state responsible for actions that for all practical purposes it could not control. If the NCAA is a state actor, it is a different type of state actor than what has typically been encountered in past cases. But by adopting the "strange doctrine" that an organization cannot be a state actor if a majority of members are not located in any particular state, the Court blinds itself to the numerous ways that such organizations can influence public institutions. Individuals being told by their school that they must follow NCAA rules are not likely to be persuaded by the argument that the NCAA is not a state actor because their rules were created by representatives of schools outside the state.

One interpretation of the Court's argument is that states can escape constitutional responsibility for their actions by joining organizations with other states and then creating rules that bind their respective states. However, this does not seem to be the Court's position. The majority seems to be arguing that the actions of the organization cannot be considered state action, but the state itself may still be responsible to constitutional restraints if it seeks to enforce the rules of the organization. This latter interpretation is far less worrisome than the former, but even this position is problematic. Tarkanian, for instance, won an injunction against UNLV for carrying out the NCAA's proposed sanctions. If Tarkanian could not take the NCAA to Court and UNLV could not impose the sanctions, UNLV would either have to accept greater sanctions or withdraw from the organization. Given the prestige and money associated with participation in major sports, neither of these are reasonable options for the University. Thus, it is not surprising that the school opted to replace Tarkanian as its basketball coach by offering him a settlement.

The Court's position may force other types of Hobson's choices. Indeed, it is not unlikely that at least some athletes or coaches would decide that rather than expose their school to increased penalties they will

64. *Id.* at 461 (citing *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936-37 (1982)).

simply drop their constitutional claim.⁶⁵ While the exercise of any constitutional claim may carry personal costs, they are usually somewhat more indirect than the ones the Court seems to be endorsing here. Realistically, the only way an individual could force a change in such policies is by getting an injunction against the university. If enough states were put into this type of Catch 22, they could collectively force the NCAA to reconsider its procedures.⁶⁶ Given the organizational strength and wealth of the NCAA, this is expecting a great deal from individuals whose only real goal are getting the NCAA to pay attention to basic constitutional concerns. Since this is not a situation where a broader reading of state action would raise any legitimate issues of associational privacy, or produce threats to any other types of protected liberty, it is not clear why the court found it necessary to adopt such a restricted view of the state action doctrine. What is clear, however, is that such a view creates grave difficulties for any student-athletes compelled to challenge the drug testing policies of the NCAA.⁶⁷

VI. DRUG TESTING AND THE CONSTITUTION

Even if the NCAA is considered to be a state actor, this does not automatically mean that its drug testing policies violate an athlete's constitutional rights. The answer to this question depends upon how a court balances the claimed privacy interests of the athletes against the claimed special needs of the university and the NCAA. This, is the approach that the U.S. Supreme Court has endorsed in the previous drug testing cases that have come before it.

The Court's approach to drug testing is an outgrowth of the more general approach of balancing that the Court has adopted in recent Fourth Amendment cases. The initial step is to claim that the Fourth

65. A University of Colorado athlete explaining why she went along with the NCAA's drug testing program noted that "The NCAA is a very big institution and, you know, I wouldn't know how to fight that. I wouldn't be about to take my team's interests down the tubes because I didn't want to do the urinalysis." See *Univerity of Colorado v. Derdeyn*, 863 P.2d 929, 941 (Colo. 1993).

66. To some degree this appears to be happening as legislation has been introduced in several states to require that the NCAA follow due process in its dealing with students and university staff. In response, the NCAA's executive director stated that if legislation of this type keep universities from following the rules it might lead to the disqualification of some universities. See Wint Winter, *NCAA's Actions Affect Too Many to Let it Operate Above the Law*, USA TODAY, Mar. 5, 1991, at 10C.

67. For a discussion of federal attempts to have the NCAA considered a state actor as well as state legislative attempts to require the NCAA to follow due process in its investigative procedures, see Kevin McKenna, *Courts Leave Legislatures to Decide The Fate of the NCAA In Providing Due Process*, 2 SETON HALL J. SPORT L. 77 (1992).

Amendment does not require warrants or probable cause since neither is "an irreducible requirement of a valid search."⁶⁸ What is required is that a search be reasonable, and according to Justice O'Connor "a determination of the standard of reasonableness applicable to a particular class of searches requires 'balancing the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion'."⁶⁹ This methodology allows the Court considerable room for discretion. By either understating the privacy interests at risk or by placing added emphasis on the government interests in obtaining some particular type of information, it is easy for the Court to dispense with both the warrant and probable cause requirements of the Fourth Amendment.⁷⁰

Although the Court's use of the balancing test has relaxed the procedural requirements of the Fourth Amendment, in all but the most routine administrative searches the Court has required information that focuses suspicion directly on the individual.⁷¹ Policies that call for periodic drug tests on government employees or student athletes certainly do not meet this threshold requirement. However, government lawyers asserted that a showing of special needs should overwhelm even this previously minimum requirement.⁷²

The U.S. Supreme Court had been silent on the issue until the 1988 term when the justices heard two cases that dealt with the extent to which federal agencies can order drug testing. The two cases came to the Court with conflicting decisions from the appellate courts. In one case, *Skinner v. Railway Labor Executives Association*, the Court reviewed a policy of the Federal Railway Administration that sought to require both alcohol and drug testing of train crews after an accident or when operating rules had been violated. A refusal to submit to a test would result in the employee receiving a nine month suspension. The Ninth Circuit Court of Appeals ruled that this policy was a violation of the Fourth Amendment. Even though the ninth circuit used the balancing approach, it argued that without some degree of particularized suspicion

68. *New Jersey v. T.L.O.*, 469 U.S. 325, 340 (1985).

69. *O'Connor v. Ortega*, 107 S. Ct. 1492, 1498-99 (1987).

70. See Don Crowley & Jeff Johnson, *Balancing and the Expectation of Privacy*, 7 PUB. L. REV. 337 (1988).

71. See *O'Connor v. Ortega*, 107 S. Ct. 1492 (1987).

72. Ironically, one of the federal government lawyers who argued that the special needs of government should overcome the Fourth Amendment claims of individuals was former Solicitor General Charles Fried who argued the employee drug cases for the Justice Department. Earlier in his career Fried wrote a widely read defense of privacy as essential to human dignity.

accidents or rule violations by themselves did not create reasonable ground for suspecting drug usage.⁷³ In contrast, the Fifth Circuit Court of Appeals upheld the use of drug testing for Custom's Service employees who are selected for promotions.⁷⁴ In *National Treasury Employee's Union v. Von Raab*, the fifth circuit balanced the interests involved and concluded that considering the need for "public confidence in the integrity of the Service," the risk to public safety from employees that use drugs, and the limited scope of the search—drug testing—even in the absence of "individualized suspicion," was not unreasonable.⁷⁵

VII. BALANCING AND DRUG TESTING

Given recent tendencies toward allowing governmental needs to outweigh Fourth Amendment claims under the Court's ad hoc balancing approach, close observers of the Rehnquist Court were not surprised by the two decisions on drug testing. In both cases the Court's majority treated the drug testing as essentially administrative in nature and not conducted for purposes of criminal investigation.⁷⁶ For Justice Kennedy, writing for a seven person majority in *Skinner* and a five person majority in *National Treasury Employee's Union v. Von Raab*, classifying drug testing as administrative justified dispensing with normal Fourth Amendment requirements. Instead, the reasonableness of the search would be determined by balancing the special needs of government against the railroad workers expectation of privacy. In *Skinner*, Justice Kennedy reasoned that even though the Fourth Amendment applied to the employees in question and blood and urine testing constituted a search and seizure, the workers' expectation of privacy was diminished by the fact that they were employed in a highly regulated industry.⁷⁷ This diminished expectation of privacy was then weighed against the significant government interests in ensuring a safe transportation industry. By ap-

73. *Railway Labor Executives' Association v. Burnley*, 839 F.2d 575 (9th Cir. 1988).

74. *National Treasury Employees Union v. Von Raab*, 816 F.2d 170 (9th Cir. 1987).

75. *Id.* at 179.

76. This claim was more accurate in *Von Raab* than in *Skinner*. In the former case, the test results could not be used in a criminal prosecution without the employee's consent while in the latter case the Federal Railway Administration could make test samples available for litigation purposes.

77. *Skinner v. Railway Labor Executives Ass'n*, 489 U.S. 602, 627 (1989). The Court's use of the "highly regulated industry" rationale to justify government's imposition of drug testing is interesting given the fact that being a highly regulated industry is not sufficient government entanglement to constitute state action. It seems that to the Court majority being heavily regulated is sufficient grounds to justify governmental invasions of privacy but not a sufficient basis to claim constitutional protection from actions by the industry.

plying its balancing formula in this manner, the court reached the predictable result that drug testing under such circumstances was not unreasonable.⁷⁸

The most striking aspect of this opinion was not the Court's decision to abandon both probable cause and the warrant rule, these niceties being easy victims of balancing. Rather, it was the Court's unwillingness to demand that the Federal Railroad Administration show some degree of suspicion focused on the individual. Prior to this decision, the Court had been willing to jettison individualized suspicion only in situations deemed to be routine administrative searches or border stops.⁷⁹ However, none of these previous situations had involved the degree of intrusion into an individual's privacy authorized here. In *Skinner*, the Court eroded what some had thought to be the bottom line constitutional requirement by minimizing the invasion of privacy and emphasizing the importance of the information to be obtained:

In limited circumstances, where the privacy interests implicated by the search are minimal, and where an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion, a search may be reasonable despite the absence of such suspicion. We believe this is true of the intrusions in question here.⁸⁰

To the Court the fact that this was a highly regulated industry whose employees must undergo other types of medical screening in order to maintain their jobs mitigated against the claim that drug and alcohol testing constituted a highly intrusive invasion of privacy.⁸¹ Justice Kennedy also asserted that the intrusion is minimal due to the lack of administrative discretion and the circumspect nature of the required monitoring. The Court accepted the reasonableness of testing because

78. Alexander Aleinikoff has argued that the Court's increasing use of balancing threatens the notion of constitutional supremacy. "For under a regime of balancing a constitutional judgment no longer looks like a trump. It seems merely to be a card of a higher value in the same suit." T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L. J. 943, 992 (1987). I would add that in recent Fourth Amendment cases the individuals' interest in privacy not only is not a trump it does not possess a higher value than the governments' "special needs" card.

79. See *U.S. v. Martinez-Fuerte*, 428 U.S. 543 (1976); *Camara v. Municipal Court*, 387 U.S. 523 (1967). The Court's recent tendency to claim that an administrative search is a blanket exception to the warrant requirement is certainly a novel argument. This claim is particularly interesting given that the Fourth Amendment makes no distinction between criminal and civil proceedings. See Lynn Searle, *The Administrative Search from Dewey to Burger*, 16 HASTINGS CONST. L.Q. 261 (1989).

80. *Skinner*, 489 U.S. at 624.

81. *Id.* at 627.

they were convinced that the tests would help to make railroad transportation safer. "Employees subject to the tests discharge duties fraught with such risks of injury to others that even a momentary lapse of attention can have disastrous consequences."⁸² The assumption that testing will improve safety was crucial and ultimately overwhelmed other considerations. If testing will help make the system safer, then any restriction of testing that might frustrate this important governmental goal becomes suspect. Thus, even the minimum requirement of individualized suspicion is too great a burden to impose, since obtaining this type of focused information would be difficult and hinder the railroad's ability to obtain the necessary information.⁸³ Such an argument inverts our traditional understanding of the Fourth Amendment since the legitimacy of the search rests on government demonstrating a sufficient need for information, not, as has traditionally been the case, whether there is any reason to believe that an individual has engaged in misconduct.

Given its importance to the final outcome, one might have expected the Court to carefully evaluate the effectiveness and accuracy of drug testing as well as the ability of such tests to determine whether a person's job performance has been impaired. Instead, the Court engaged in only a perfunctory analysis of the efficacy of testing and accepted the conclusions of the Federal Railroad Administration that testing would enhance safety.⁸⁴ Without much discussion, the Court simply deferred to the agency's position that testing can yield valuable information about job impairment, and that even if it does not, testing will act as a deterrent to the use of drugs.⁸⁵ Both claims are highly problematic. However, the

82. *Id.* at 628.

83. The Court accepted the Federal Railway Administration's claim that an impaired employee would "seldom display any outward signs detectable by the lay person . . ." *Id.* This difficulty plus the confusion likely to surround a major accident led the Court to assert that a demand for individualized suspicion was impractical. This claim would not seem to be applicable to drug testing of college athletes since the concern with public safety or the special circumstances of an accident are certainly not present.

84. In rejecting the Court of Appeals' fear that drug testing might not always be accurate, the Court simply asserted that the Agency found testing to be accurate and those challenging the program failed to provide any "reason for doubting the Agency's conclusion that the tests at issue here are accurate in the overwhelming majority of cases." *Id.* at 633.

85. The Court offered no evidence for its deterrence theory other than that employees will know that they will be tested after an accident and that no one can know when an accident will occur. *Id.* at 630. In his concurring opinion, Justice Stevens points out that most people "do not go to work with the expectation that they may be involved in a major accident." *Id.* at 634 (Stevens, J., concurring).

Court brushed aside any doubts by asserting that those challenging the regulations failed to prove that the agency's conclusions were wrong.⁸⁶

Justice Kennedy's opinion upholding drug testing for customs officials seeking placement in a position which involves either the enforcement of drug laws or carrying firearms was similar to *Skinner*. In *Von Raab*, the Court again found "special governmental needs" which overwhelmed the traditional protections of the Fourth Amendment. Thus, according to the Court, the country's "interest in self protection could be irreparably damaged if those charged with safeguarding it were, because of their own drug use, unsympathetic to their mission"⁸⁷ Couched in this way, whatever interests in privacy customs officials may possess are trivial in comparison to "the veritable national crisis in law enforcement caused by the smuggling of illicit narcotics."⁸⁸ Given that the use of drugs may affect an employee's judgment and fitness, any infringement of privacy expectations is outweighed by "the Government's compelling interests in safety and in the integrity of our borders."⁸⁹ As in *Skinner*, the Court uncritically accepted the Customs Service assertion of need, but here, the Court was content with generalized assertions of a national drug problem. There was no evidence presented which demonstrated a drug problem in the Customs Service. The Commissioner of the Custom Service even stated prior to announcing the testing policy that he felt that "Customs is largely drug free."⁹⁰ Again, the Court accepted the agency view that testing will provide the public with assurances that their employees are above suspicion.⁹¹

Even though Justices Scalia and Stevens joined the majority in the railroad case, they were unconvinced that the Customs Service program had any real connection to any grave harm that it was likely to prevent.⁹² Less bothered than dissenter Justices Brennan and Marshall with the use of balancing, Justices Scalia and Stevens insisted that the connection be-

86. *Id.* at 629. The problem of false inferences from a positive test did not bother the court either, although it does not take much imagination to guess what the newspaper headlines would look like after an employee, associated with an accident, tested positive for drugs.

87. *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 670 (1989).

88. *Id.* at 668.

89. *Id.* at 672.

90. *Id.* at 683 (Scalia, J., dissenting).

91. Customs Officers waiting for a promotion would seem to be more likely to escape detection than the railroad employees in *Skinner*. The Court dismisses this claim but it seems plausible that a Customs employee who knows he is coming up for promotion could manage to avoid drugs until after the tests. In any case, performing such tests will hardly assure that employees are above suspicion of bribery.

92. *Von Raab*, 489 U.S. at 681. (Scalia, J., dissenting).

tween drug testing and any asserted government interest be more direct and the alleged harm more imminent than that advanced by the Customs Service.⁹³ Although they accepted the testing in *Skinner* given "the long history of alcohol abuse in the railroad industry," they saw no such evidence relating to the Customs officers and suggested that the main purpose of the Customs Service testing was to set an example.⁹⁴ "I think it obvious that this justification is unacceptable; that the impairment of individual liberties cannot be the means of making a point; that symbolism, even symbolism for so worthy a cause as the abolition of unlawful drugs, cannot validate an otherwise unreasonable search."⁹⁵

Where Justices Scalia and Stevens saw a distinction between the two programs, Justices Marshall and Brennan saw both as blatant violations of the Fourth Amendment. Their principal complaint concerned the Court's continued use of ad hoc balancing. Balancing, they claimed, has led to reading the warrant and probable cause requirements out of the Fourth Amendment in favor of a reasonableness requirement which is "virtually devoid of meaning, subject to whatever content shifting judicial majorities, concerned about the problem of the day, chose to give to that supple term."⁹⁶

Apart from their lonely attack on balancing, Justices Marshall and Brennan argued that even on its own terms the Court's approach was flawed. Justice Marshall pointed out that initially the Court acknowledged that "there are few activities in our society more personal or private than the passing of urine," then the Court ignored its own words and declared that drug testing is only minimally intrusive.⁹⁷ After having deflated the privacy interests at stake, Justice Marshall accused the majority of inflating the government's interest by uncritically accepting the notion that testing will be an effective deterrent to drug use.⁹⁸ The Court's refusal to demand a closer connection between the use of drug

93. *Id.* While Scalia thought there was a clear connection between the frequency of drug or alcohol use and train safety, he saw little connection between testing and any public harm likely to occur in the customs case. "I decline to join the Court's opinion in the present case because neither frequency of use nor connection to harm is demonstrated or even likely. In my view, the Customs Service rules are a kind of immolation of privacy and human dignity in symbolic opposition to drug use." *Id.* Some might have thought that such a position would lead Scalia to be suspicious of testing of high school athletes but apparently that is not the case. Apparently Scalia is more protective of the privacy interests of government employees than high school athletes. Where college athletes fall on this scale would be hard to predict.

94. *Id.* at 684, 686.

95. *Id.* at 687.

96. *Skinner*, 489 U.S. at 637 (Marshall, J., dissenting).

97. *Id.* at 647.

98. *Id.* at 653.

testing and some "particularized facts" focused on the individual illustrates the extent to which the majority has been "swept away by society's obsession with stopping the scourge of illegal drugs"⁹⁹

Despite the objections raised by the dissenters, the effect of these decisions was to justify drug testing for at least some categories of public employment. The extent to which the Court will be willing to allow government ordered drug testing on its employees or employees in "highly regulated" industries is not yet totally clear, but these decisions suggest that when government can make a plausible claim to protecting public safety the use of drug testing will be upheld.¹⁰⁰

VIII. CHALLENGES TO TESTING ATHLETES

How these decisions apply to college athletes is open to debate. Given the flexible nature of the ad hoc balancing employed by the Court, one cannot be sure how drug testing of college athletes would be viewed. Do the supposed "special needs" of government outweigh the privacy interests of college athletes? Do the alleged deterrent effects justify the intrusion? As discussed earlier, the issue has been blurred by discussions regarding the legal status of the NCAA. Thus, in the wake of *Tarkanian*, the NCAA has not been held to Fourth Amendment standards. However, in some states attempts have been made to argue that even private associations must meet state constitutional requirements. Beyond this, the Fourth Amendment and corresponding state constitutional restrictions clearly apply to testing undertaken directly by either public universities or public school districts. A variety of State and Federal courts have reached conflicting results in dealing with this issue.¹⁰¹

In late 1993 the Colorado Supreme Court ruled against the University of Colorado's drug testing program. The challenged program directly presented the constitutionality of drug testing under the Fourth Amendment. The University of Colorado's drug testing policy applied to all students engaged in intercollegiate athletics including such indirect

99. *Id.* at 654.

100. For instance, the five person majority in *Von Raab* was uncertain whether all Customs Service employees cleared to handle "classified information" should be included in the drug testing program. Apparently, the majority was prepared to uphold testing for those who handle "sensitive information" but not for all employees that have classified clearance.

101. See, e.g., *Hill v. NCAA* 273 Cal. Rptr. 403 (Cal. App. 6th Dist. 1990); *Bally v. Northeastern University*, 532 N.E.2d 49 (Mass. 1989); *University of Colorado v. Derdeyn*, 863 P.2d 929 (Colo. 1993). See also *Schail ex rel. Kross v. Tippecanoe County Sch. Corp.*, 864 F.2d 1309 (7th Cir. 1989).

participants as cheerleaders, student trainers and managers.¹⁰² The policy had been in force since 1984 and had undergone various revisions. In its most recent version students signed consent forms allowing a urinalysis at the annual physical and then another urinalysis if any student was deemed suspicious after a random "rapid eye examination." In essence, failing the rapid eye examination was thought to constitute "reasonable suspicion" of drug use.¹⁰³ The University argued alternatively that its program was voluntary, only minimally intruded upon reasonable expectations of privacy, and was supported by compelling state interests.¹⁰⁴

In *University of Colorado v. Derdeyn*, the Colorado Supreme Court rejected all of these claims. The Court found that the program was neither voluntary nor supported by reasonable suspicion. The Court did not address the question of whether drug testing would be constitutional if supported by reasonable suspicion. In balancing the competing interests, the Colorado Court did not minimize the privacy interests at stake in the way the U.S. Supreme Court had in *Skinner* and *Von Raab*. The Colorado Supreme Court argued that even if athletes are heavily regulated and had already been subjected to NCAA drug testing in championship events, this did not constitute sufficient grounds for overriding the significant privacy interests compromised by Colorado's policy.¹⁰⁵ On the other side of the balance, the Colorado Court found the claims made in support of a compelling state interest to be far from persuasive. In particular, unlike *Skinner* or *Von Raab*, the Court saw no significant public safety interest at stake. While granting that the school has a significant interest in protecting the health and safety of its students, the Court was not persuaded that such a claim justified the exercise of state power in the absence of reasonable suspicion.¹⁰⁶

A case reaching the opposite conclusion was decided by the California Supreme Court in January of 1994. In *Hill v. NCAA*, two Stanford University student athletes challenged the NCAA's drug testing policies. Despite the fact that Stanford University is not a public university and the NCAA was not found to be a state actor, a California appeals court held that the California State Constitution's guarantee of privacy protects individuals from invasions by both governmental and private actors.¹⁰⁷ With the complicating state action issue made irrelevant, the

102. *Derdeyn*, 863 P.2d at 932.

103. *Id.*

104. *Id.* at 937.

105. *Id.* at 943.

106. *Id.* at 945.

107. 273 Cal Rptr. 403 (Cal. App. 6th Dist. 1990).

NCAA's drug testing policies were initially found to violate the athlete's right to privacy. However, the California Supreme Court reversed and upheld the constitutionality of the NCAA's policy.¹⁰⁸

In a split decision, the California Supreme Court acknowledged that the right to privacy guaranteed by California's Constitution applied to the NCAA, but ultimately accepted the organization's claim that its drug testing policy was justified since it served to protect the health and safety of student athletes and also because testing helped to promote "the integrity of intercollegiate athletic competition."¹⁰⁹ The *Hill* court did not engage in a detailed analysis of Fourth Amendment considerations and made it clear that such an analysis was not applicable to a private organization such as the NCAA. The court majority regarded the privacy interests at stake as diluted by the "social norms that effectively diminish the athlete's reasonable expectation of personal privacy in his or her bodily condition, both internal and external."¹¹⁰ In interpreting what type of standards to apply to the NCAA the *Hill* court was clearly deferential to the prerogatives of the NCAA as a private association and regarded "the NCAA's stated motives not with hostility or intense skepticism, but with a respectful presumption of validity."¹¹¹

There are considerable differences in the way these two State Supreme Courts treated the underlying assumptions surrounding drug testing of college athletes. One could argue that in a narrow sense the decisions are not comparable since the *Derdeyn* case was argued under the Fourth Amendment and its corresponding state provision, while the *Hill* case was argued under the somewhat more ambiguous concept of a right to privacy that had been added to the California Constitution by initiative in 1972.¹¹² Further, in *Derdeyn* the testing was done by a state agency, while in *Hill* the testing was conducted by a private organization which according to the California Supreme Court was not required to demonstrate compelling reasons for their actions. These differences

108. 865 P.2d 633 (Cal. 1994).

109. *Id.* at 659.

110. *Id.* at 658.

111. *Id.* at 660.

112. Proposition 11 in 1972 added the words "and privacy" to the list of inalienable right possessed by the people of California. This right has long been held by California courts to be a restraint on both government and business activities. There has been considerably less agreement on what this right entails. The California Supreme Court in *Hill* never seriously questioned the status of the NCAA as a private organization and spent much of its time debating whether the NCAA needed to demonstrate a compelling interest to pursue its drug testing program. The majority decided that it did not need to demonstrate a compelling interest and that in any case its interests were sufficiently important. *Id.* at 668.

notwithstanding, it is apparent that the Colorado court was far more sympathetic to the privacy interests compromised by drug testing and far less convinced that the practice of drug testing college athletes furthered significant public interests.

As the *Derdeyn* case illustrates, when privacy interests are taken seriously, drug testing fails except in cases when suspicion is focused on the individual. However, as long as the NCAA is seen as beyond constitutional scrutiny, student athletes are rendered powerless to challenge its program. Moreover, given the vagaries of ad hoc balancing, even when the testing is conducted by a public university, some courts will continue to erode the core protections of the Fourth Amendment. All that is needed is an assertion that the special needs of schools to insure safety and fair competition among athletes outweighs the minimal invasion of an athlete's privacy. This tendency toward creating wholesale exceptions to the Fourth Amendment by relying on generalized speculations of public need undermines values central to our concept of limited government. As Justice Marshall noted in *Skinner*, such decisions ultimately "reduce the privacy all citizens may enjoy."¹¹³ Such a cost seems a heavy price to pay for symbolic reassurance that something is being done about the nation's drug problem.

A case that clearly illustrates such an approach is the decision reached by the U.S. Supreme Court in *Vernonia School District v. Acton*.¹¹⁴ The *Acton* decision deals directly with the issue of drug testing of athletes at the junior high and high school level and indicates considerable judicial sympathy towards drug testing of athletes, although it is unclear how significant the particular factual background of this case will be. In *Acton*, the drug testing policies of a small Oregon school district were challenged by a young male who wanted to play football. The Vernonia policy required that all students intending to play interscholastic sports take a drug test at the beginning of the season and then potentially be tested on a random basis throughout the season. This policy was instituted in the fall of 1989 and was challenged by James Acton and his parents in the fall of 1991, when James entered the seventh grade.¹¹⁵

The specific events that the school district offered to justify their policy occurred when James Acton was in elementary school. In the mid-1980s school district administrators and officials became concerned with what they perceived as a rise in drug and alcohol use and a marked in-

113. *Skinner*, 489 U.S. at 1433 (Marshall, J., dissenting).

114. *Vernonia Sch. Dist. 47J v. Acton*, 115 S. Ct. 2386 (1995).

115. *Id.* at 2390.

crease in disciplinary problems. (It is interesting to note that during this time frame national surveys showed a decline in teenage drug use while national media attention and concern with drug use accelerated dramatically. Whether Vernonia actually was experiencing an increase in drug use or simply reflecting heightened national concern is next to impossible to determine.)¹¹⁶ The evidence offered to the district court in support of a growing drug problem consisted of events such as a teacher claiming to have frequently seen students smoking marijuana in a cafe across the street from the high school, an English teacher receiving several essays describing and "glorifying" student drug and alcohol use, coaches attributing an injury and poor on the field execution to drug use, and some students admitting to the use of marijuana. School officials furthered testified to a general decline in discipline and complained of an open revolt by significant parts of the student body which they felt was being led by athletes.¹¹⁷

According to the federal district court these facts led the school district to the "inescapable conclusion that the rebellion was being fueled by alcohol and drug abuse"¹¹⁸ The federal court of appeals was somewhat less convinced by the school districts account of an out of control drug problem and noted that all the evidence showed was "that there was some drug usage in the schools, that student discipline had declined, that athletes were involved, and that there was reason to believe that one athlete had suffered an injury because of drug usage and others may have."¹¹⁹ By the time these events were distilled by the Supreme Court, the majority was willing to characterize it as an "immediate crisis of greater proportions than existed in *Skinner*"¹²⁰ Even

116. Public perception of drug use in public schools first edged out discipline as the "biggest problem facing public schools" in 1986, and continued to increase through the time period in which Vernonia first began to consider its drug testing policy. See GALLUP REPORT, Sept. 1989, Report # 288, at 41.

117. Judge Marsh of the Federal District Court asserted that the "evidence amply demonstrated that the administration was at its wits end and that a large segment of the student body, particularly those involved in interscholastic athletics, was in a state of rebellion." *Acton v. Vernonia School District* 47J, 796 F.Supp. 1354, 1357 (D. Or. 1992). The Federal Appeals Court was considerably less impressed that the evidence demonstrated such a drug fueled rebellion and was only willing to conclude "that drug use appeared to be more extreme than it should be and even seemed to be growing." *Acton v. Vernonia School District* 47J, 23 F.3d 1514, 1519 (9th Cir. 1994).

118. *Acton v. Vernonia Sch. Dist.* 47J, 796 F. Supp. 1354, 1357 (D. Or. 1992).

119. *Acton v. Vernonia Sch. Dist.* 47J, 23 F.3d 1514, 1519 (9th Cir. 1994).

120. *Vernonia Sch. Dist. 47J v. Acton*, 115 S. Ct. 2386, 2395 (1995).

the dissenters were willing to read the record as demonstrating "a drug related discipline problem . . . of epidemic proportions."¹²¹

These events formed the background to the development of Vernonia's drug testing policy in the fall of 1989. The policy was expected to accomplish a variety of goals, most notably to deter the use of drugs by athletes and, because of the alleged status of athletes as role models, deter the use of drugs generally. As a practical matter approximately two-thirds of the student body participated in district sponsored athletic activities.¹²² Thus, testing athletes affected a far larger proportion of the student body than the typical urban or suburban school district. Given that Vernonia felt that its disciplinary problems and drug use were interrelated, the policy was also expected to contribute to greater order and control within the school. Finally, the policy was seen as protecting the health and safety of the athletes.

By the time the policy was implemented, many of those who had participated in the events used to justify the policy had graduated. Certainly, by the time James Acton challenged the policy all those in the high school at the time of the sharp increase in disciplinary problems had already left school. Using such incidents as a justification for a random suspicionless testing policy shows how clearly such cases differ from normal Fourth Amendment cases. It is questionable to test someone due to the indiscretions of one's classmates, and even more questionable when one's privacy is intruded upon due to the conflicts of students long removed.

Of course such concerns might be significantly weakened when public safety is clearly at risk. This is the principle that emerges from *Skinner*. But the public safety claim here is very weak if not nonexistent. Clearly the school district was mainly interested in asserting control and the drug testing of athletes was a highly visible, if not an effective means of doing so. Choosing a testing policy instead of employing a more concerted effort at information and education indicates that the district was more interested in social control than in aiding students to make responsible choices. As John Gilliom has argued with respect to drug testing of employees, such tests have the "power to pull the individual out of the mass and lay him or her open for a scientific survey of behavior around-

121. *Id.* at 2406 (O'Connor, J., dissenting).

122. According to the evidence presented at the trial, "60-65% of the high school students and 75 % of the elementary school students participate in district sponsored athletics." *Acton v. Vernonia Sch. Dist.* 47J, 796 F. Supp. 1354, 1356 (1992).

the-clock"¹²³ "Since detailed and total information is essential to the disciplinary society, one can easily see how a biological examination such as a drug test would fit into the machinery of administration."¹²⁴

Since the testing policy did not test for alcohol, and like most testing policies was far more likely to pick up marijuana than cocaine, even if the district's asserted relation between substance abuse, athletes, and disciplinary problems was accurate, there are far more direct ways to deal with the problem. The most obvious way would be removal from the team or even suspension from school for those causing the disciplinary problems. It is tempting to say that the district's policy was "a kind of immolation of privacy and human dignity in symbolic opposition to drug use."¹²⁵ However, the Justice who made this claim in opposition to the Custom Service drug testing policy in *Von Raab* wrote the majority decision upholding Vernonia's policy.

IX. UPHOLDING DRUG TESTING FOR HIGH SCHOOL ATHLETES

The Ninth Circuit Court of Appeals interpreted the Supreme Court's decisions in *Skinner* and *Von Raab* as well as other federal appellate court decisions dealing with drug testing as requiring that the government demonstrate "truly serious concerns of a safety nature."¹²⁶ While characterizing the Vernonia school district's goals as "worthy," they nevertheless found that they "suffer by comparison to the kinds of dangers that have existed when random testing has been approved."¹²⁷ After its drug testing program was stopped, the district appealed to a considerably more sympathetic U.S. Supreme Court. Supported by the Clinton Administration as well as both of President Clinton's appointments, the Supreme Court upheld, in a six to three decision, Vernonia's drug testing policy.

Justice Scalia's majority opinion noted that Vernonia's drug testing program took place in a public school environment and stressed the greatly attenuated expectations of privacy students possess in such a setting. Thus, it is central to Scalia's view that the policy was aimed at "children who have been committed to the temporary custody of the State as

123. JOHN GILLIOM, *SURVEILLANCE, PRIVACY, AND THE LAW: EMPLOYEE DRUG TESTING AND THE POLITICS OF SOCIAL CONTROL* 55 (1994).

124. *Id.* For a somewhat similar argument, see Jurg Gerber et al., *Drug Testing and Social Control: Implications for State Theory*, 14 *CONTEMPORARY CRISES* 243 (1990).

125. *Von Raab*, 489 U.S. at 1398 (Scalia, J., dissenting).

126. *Acton v. Vernonia School District* 47J, 23 F.3d 1514, 1524 (9th Cir. 1994).

127. *Id.* at 1526.

schoolmaster.”¹²⁸ The school setting permits “a degree of supervision and control that could not be exercised over free adults.”¹²⁹ Consequently, while making the obligatory assertion that children do not “shed their constitutional rights . . . at the schoolhouse gate . . .,” the Court goes on to greatly restrict the nature of the rights available.¹³⁰

At this point the logic of the decision would seem to apply to all students. Certainly, the degree to which this decision is limited to athletes remains one of the main unanswered questions. Even though some of Justice Scalia’s majority opinion seems to apply to all students, it also accentuates the specific circumstances of athletes. Athletes, it appears, have even fewer expectations of privacy than the typical student, since according to Scalia “school sports are not for the bashful.”¹³¹ Beyond the rather open and communal nature of the locker room facilities, athletes also voluntarily subject themselves to a greater degree of regulation than other students. Such regulations include preseason physical examinations, adequate insurance coverage, minimum grade point average, and various rules of conduct and training. Justice Scalia’s point is to claim that athletes are similar to workers who toil in a highly regulated industry, and thus “ought to expect intrusions upon normal rights and privileges, including privacy.”¹³²

Having made the case for a greatly reduced expectation of privacy, the majority then argues that the drug testing employed by the school district was only minimally intrusive and certainly did not violate the already greatly diminished expectations of privacy possessed by athletes. The Court’s notion of the degree of intrusion caused by the tests seem to be based on two considerations. First, the extent of monitoring is rather indirect and the observation involved is no greater than would normally be expected in a public restroom or locker room. Finally, the Court seems unconcerned with the potential information that might be uncovered through urinalysis. In their view, the school district only tests for drugs, not other medical conditions, and the information is disclosed to

128. *Vernonia Sch. Dist. 47J v. Acton*, 115 S. Ct. 2386, 2391 (1995).

129. *Id.* at 2392.

130. The reference is to Justice Fortas’ oft quoted comment from *Tinker v. Des Moines School District*, 393 U.S. 503, 506 (1969). In most recent cases involving the application of Constitutional rights to students the Court quotes Fortas and then proceeds to explain why the right under question doesn’t apply to students. This was certainly what happened here.

131. *Acton*, 115 S. Ct. at 2392.

132. *Id.* at 2393.

only a limited number of school personnel and not made available to law enforcement.¹³³

Under the balancing formula the Court increasingly employs in Fourth Amendment cases, once the Court concluded that student athletes possessed a "lesser expectation of privacy," all that remained was to establish the governmental interest in obtaining the information. Since the intrusion was regarded as fairly minimal, it is not apparent how great a showing of special needs a school district needs to make. Both the federal district court and the court of appeals felt that the search needed to be justified by a compelling government interest. They simply reached opposite conclusions as to whether a compelling need had been demonstrated. Justice Scalia's opinion noticeably hedges on whether it is even necessary in this context for government to demonstrate a compelling need for the search. Justice Scalia asserts that the government interest here is "important-indeed, perhaps compelling."¹³⁴ While this formulation is far from precise, the majority clearly believes that "detering drug use by our Nation's schoolchildren is at least as important" as the interests advanced in *Skinner* and *Von Raab*.¹³⁵ Beyond the general interest in deterring drug use, the majority notes the probable effects of helping to prevent disruption in the schools and protecting the participants in athletic events.

In general the majority opinion is uninterested in exploring in any detail questions about the limitations of drug testing, the efficacy of focusing on athletes, or the degree of deterrence that might be expected. The Court breezily dismissed these concerns by asserting that "it seems to us self-evident that a drug problem largely fueled by the 'role-model' effect of athletes' drug use, and of particular danger to athletes, is effectively addressed by making sure that athletes do not use drugs."¹³⁶ The factual assumptions the Court is willing to accept as self-evident are truly breathtaking. Equally noteworthy is the ease with which the Court dismisses arguments suggesting that the same results could be achieved with a testing mechanism that focused on individualized suspicion, and thus did not seek to snare in its net those who had done nothing more to arouse suspicion than entertain a desire to play competitive sports. From the majority's perspective, testing based on reasonable suspicion would be worse because it would put a "badge of shame" on those who

133. *Id.*

134. *Id.* at 2395.

135. *Id.*

136. *Id.* at 2395-96.

are singled out and creates the risk that teachers would "impose testing arbitrarily upon troublesome but not drug-likely students."¹³⁷ Finally, and somewhat ironically, the Court rejects suspicion based testing because it puts teachers in the position of spotting drug abuse, a task for which they are "ill prepared" and not "readily compatible with their vocation."¹³⁸ The Court worries that such difficulties might generate more law suits and undermine the student-teacher relationship.

The Court does not make a convincing case for such claims. Certainly such arguments tend to turn traditional Fourth Amendment considerations upside down. Anytime any government official engages in a search, it potentially stigmatizes those who are singled out. One would assume that this is one of the reasons for the concept of probable cause. If government is going to invade someone's privacy and potentially subject them to the suspicions of their neighbors, then there needs to be strong grounds to believe that a crime has been committed. We would not accept a sweep search of a neighborhood on the theory that specifying those who are most suspicious would be potentially stigmatizing. Searching everyone might lessen the potential stigma on a type of misery loves company argument, but it greatly expands the government invasion of privacy. Arguably, the invasion of privacy is greater here because in the case of a sweep search, at least theoretically, we know that a crime has been committed. Vernonia's drug testing policy assumes what really is not known, that the use of drugs is widespread. If the evidence is not convincing enough to establish individualized suspicion, why is it convincing enough to assume the presence of a widespread problem?

The majority's increasing use of the argument that reasonableness, not warrants and probable cause, constitutes the bottom line requirement of the Fourth Amendment tends to obscure the fact that it is suspicion directed at an individual that makes a search reasonable. As Justice O'Connor notes in dissent, random suspicionless drug testing is similar to the type of general writs that the Fourth Amendment was clearly intended to limit. "While the plain language of the Amendment does not mandate individualized suspicion as a necessary component of all searches and seizures, the historical record demonstrates that the framers believed that individualized suspicion was an inherent quality of reasonable searches and seizures."¹³⁹ Similarly, the majority's apparent

137. *Id.* at 2396.

138. *Id.*

139. *Id.* at 2399 (O'Connor, J., dissenting) (quoting Clancy, *The Role of Individualized Suspicion in Assessing the Reasonableness of Searches and Seizures*, 25 MEMPHIS ST. U. L. REV. 483, 489 (1994)).

concern that teachers might use individual suspicion to focus on a troublesome but not drug using student is curious. No doubt this is a possibility, and should caution us against casual assumptions about rebellious behavior and its linkage to drug use. But why then is it reasonable to test a whole subset of students (athletes) because some students including (but not limited to athletes) have been disruptive? Athletes as a class certainly would not seem any more likely, indeed one might argue a good deal less likely, to engage in casual use of street drugs. Given conventional stereotypes, it would seem a better bet (although equally invasive) to focus on rock bands. Certainly in the *Acton* case the evidence was not focused just on athletes as a class and the disruptive problems were not limited to them. Why is the Court worried about the badge of shame that might be placed on a falsely accused troublesome student when they are so clearly unconcerned about focusing on athletes as a class?

The Court may be right in arguing that teachers are ill-prepared to spot drug use, but this is certainly an odd argument after justifying drug testing on the basis of teacher observation of an allegedly widespread problem. Again, why are the generalized observations of some teachers good enough to create a blanket requirement for testing athletes, but not reliable when a teacher casts suspicion directly at an individual? Writing about one's drug adventures in an English essay might or might not be valid grounds for drug testing, but it would certainly appear to make a more persuasive case for testing the writer than when generalized across the entire range of participants in sports. Given the Court's watered down individualized suspicion requirement, it is doubtful that courts would demand much to justify a drug test. Indeed, such an approach might have an added side benefit. If enough tests done on allegedly suspicious students are negative, teachers and administrators might become less willing to make casual inferences.¹⁴⁰ As it stands, there is no way to know whether the school's inferences about a widespread problem were right since, even when the vast majority of students test negative, the proponents of the policy simply assume that the tests are performing a deterrent function.

140. While he clearly misjudged how the Court would apply the T.L.O. decision to drug testing, Eugene Lincoln argues that only when a student's at school behavior suggests they are under the influence of drugs should they be subjected to a urinalysis. He goes further and argues "that school officials have neither the authority nor the responsibility to regulate off-campus conduct which has no bearing upon the proper maintenance of the educational process." Eugene Lincoln, *Mandatory Urine Testing for Drugs in Public Schools and the Fourth Amendment: Some Thoughts for School Officials*, 18 J. L. & EDUC. 181, 187 (1989).

The Court's off-handed assertion that a policy based on individualized suspicion might harm student-teacher relations seems equally misplaced. Clearly, a teacher mistakenly suspicious of a student might undermine whatever was left of a trusting relationship, but what kind of message of trust has the school district sent to James Acton and student athletes like him.¹⁴¹ It would seem to be a far more reasonable message, and one much more directly a deterrent to disruptive behavior, to point out that certain patterns of behavior will arouse suspicion of drug use. If one does not want to be subjected to a urinalysis, then certain types of behavior should be avoided.

The Court's willingness to focus on athletes is either a prelude to justifying random drug testing of entire student bodies or is based on a largely unexamined set of assumptions about athletes as role models. The notion that somebody who might be regarded as a role model therefore deserves less constitutional protection is truly troublesome. Would we accept the same argument for teachers, valedictorians, or members of the debate team? Beyond this, we have no real reason to believe that anyone's choice to engage in recreational drug or alcohol use is seriously influenced by whether the high school quarterback does. An individual's decision to engage in recreational drug use occurs for a wide variety of psychological and social reasons. Knowing that the star athlete has used drugs could be one of those, but this is only one of a wide variety of social pressures that leads people to experiment. Moreover, why would a person prone to experimentation decide not to simply because the star athlete failed a drug test? It is hard to imagine why the debate team member, the computer wizard, or the electric guitar players behavior would be effected in any way by such a result. Indeed, the fear of getting caught barely makes the list of reasons given by college athletes on why they quit using drugs.¹⁴² The major reasons cited by NCAA athletes for quitting were either concerns about health or realization that they did

141. In an article written before *Acton*, Chris Hutton argues persuasively that even if courts are not likely to force school administrators to justify their drug testing programs, schools should nevertheless be concerned about the messages students receive from such programs. He concludes that teaching students that "individual culpability or good behavior are irrelevant when problems as serious as drug and alcohol abuse exist—will influence them long after the short-term effect of testing has dissipated. Schools will have taught important lessons about rights preserved by the Constitution, but perhaps the lesson is the opposite of what society wants young people to learn." Chris Hutton, *Schools as Good Parent: Symbolism versus Substance in Drug and Alcohol Testing of School Children*, 21 J. L. & EDUC. 33, 69 (1992).

142. See SECOND REPLICATION OF A NATIONAL STUDY, Table 15 and Table 16 (NCAA publication).

not need or like the effects of drugs.¹⁴³ Thus, continual education and meaningful information about drug use is likely to have a more lasting impact than fear of getting kicked off the team. It would certainly be more consistent with the educational mission of public schools.¹⁴⁴

X. CONCLUSION: DRUG TESTING AND SYMBOLIC CONTROL

The degree to which the *Acton* decision will stand as a justification of the wider use of drug testing for college athletes or even all students is obviously open to debate. Those interested in narrowing the scope of this decision can point to the particular facts of the Vernonia situation and seek to argue that a corresponding "epidemic" does not exist. But this is a thin reed to try to limit the use of drug testing. It should not be hard for any school district to find enough evidence to convince a Court that their problem was similar in scope to Vernonia's. The attempt to limit the use of testing to athletes is equally problematic. Justice Scalia's majority opinion seemed to emphasize the lessened expectation of privacy for athletes but given his larger argument for the paternalistic role of schools one should not be surprised if the Court continues to balance away the Fourth Amendment rights of students.

However, one could easily argue that the paternalistic role of schools at the high school level is not a meaningful argument for extending the case for drug testing to college athletes. If one reads Justice Scalia's opinion in *Von Raab* and compares it to his opinion in *Acton*, it is certainly possible to conclude that he might draw the line at high school. Still, given the vagaries of balancing it is impossible to know how other justices will weigh the alleged lesser expectation of privacy of athletes against a schools stated need to maintain a safe and fair athletic program. In short, is the *Hill* argument more likely to be accepted than the *Derdeyn* argument? Given the ideological tendencies of the Court, this writer is not optimistic that *Derdeyn* would prevail, but one hopes that at some point the Court will rediscover some meaning in the Fourth Amendment protections as it applies to drug testing.

Neither the *Skinner* and *Van Raab* decisions in 1989 nor the *Acton* decision has the Court even attempted to engage in a serious analysis of

143. *Id.*

144. It has been argued that drug education programs haven't worked. However, as Douglas Husak argues, because the "the introduction of scientifically respectable materials in drug education programs has been politically unacceptable," most education programs have been part of the War on Drugs not an alternative to it. Husak argues that a true education program would differentiate between drug use and drug abuse. See DOUGLAS HUSAK, DRUGS AND RIGHTS 255 (1992).

the realities of drug testing. The Court's unwillingness to look closely at the limitations of drug testing suggests that it is willing to accept the social control aspects of drug testing irrespective of whether it has any meaningful impact on drug use in American society. Despite popular conception, drug testing will not determine who is under the influence of drugs. A positive test for marijuana by a football tackle on Monday morning will at best only tell us that he inhaled sometime in the last month. While this action undoubtedly did not make him a better football player, the assumption that such exposure led to poor execution and unsafe play is highly dubious. Supposedly the prospect of drug testing will deter the player from any use of drugs, but it is just as likely to lead him to switch to a drug with less likelihood of being detected four weeks later, cocaine or alcohol being the obvious possibilities. While to some people deterring illegal drug use is sufficient justification, school districts should not delude themselves that a switch from marijuana to alcohol will have any significant effect on an athlete's behavior, health, or performance. According to the latest NCAA statistics, eighty-eight percent of college athletes use alcohol compared to twenty-one percent who use marijuana and one percent who use cocaine.¹⁴⁵ Neither the NCAA nor Vernonia possess any testing policies aimed at alcohol abuse.

While alcohol use is illegal for those under twenty-one, it is clearly more socially accepted. Still, if the justification for drug testing is to deter drug consumption that contributes to unruly behavior and is harmful to athletes, drug testing has rather severe limitations. Moreover, a positive test does not demonstrate that a person actually used the drug and only necessitates a more extensive test. Neither Vernonia nor the Court seem terribly concerned about the effects of a "false positive" and seemingly treat the possibility as highly unlikely. Protecting against the possibility of a false positive can get fairly costly. The NCAA with its television driven wealth probably is not too concerned with this, but a school district should be.¹⁴⁶

Ascertaining the real relationship between drug use and unruly behavior does not seem to have been a major motivator of schools like Vernonia that have undertaken the use of drug testing. School administrators seem content to say that they are sending a message, but what exactly is the message. It is clear that excluding alcohol from testing

145. See SECOND REPLICATION, *supra* note 142, at figure 4.

146. Cost considerations do seem to be limiting the extent to which school districts are willing to create a policy similar to Vernonia's. It is obviously too early to tell how many school districts will ultimately decide that the cost is worthwhile.

makes little sense if the purpose of testing is to protect athletic health and safety. However, such an exclusion makes perfect sense if the actual purpose of the program is to send symbolic reassurance to the public that something is being done about the use of illegal street drugs without disturbing the more socially acceptable consumption of alcohol. Testing for street drugs may not reduce the drug problem, but that probably is not the point. As Lance Bennett has noted, public policies are frequently the "means of affirming the larger images of the world on which they are based. In most policy areas it is more acceptable to suffer failure based on correct theories than it would be to achieve success at the price of sacrificing social values."¹⁴⁷

It is the argument of this article that the widespread use of drug testing without individualized suspicion sacrifices important social values. Even though privacy and human dignity are values deeply rooted in our Constitutional tradition, they seem to be values that many Americans and the Supreme Court are ready to dismiss in the face of a widely held perception of a drug epidemic. The complex interactions between a public convinced of a rising drug threat, fueled by a media which plays to the most sensationalized aspects of the problem, and further exacerbated by public officials eager to reassure the public that something is being done has created a climate in which drug testing is offered as a simple solution to our problems. The Court has played an important role in legitimizing drug testing for high school athletes. While some state courts may resist, it seems likely that more school districts will experiment with such policies. We may deflect our awareness of the costs to privacy and human dignity by noting that this is just for athletes or just for high school students, but there should be little doubt that acceptance of such arguments in the name of fighting a war on drugs creates a major exception to the protections offered by the Fourth Amendment and a major expansion of the social control role of our schools.

147. W. LANCE BENNETT, *PUBLIC OPINION IN AMERICAN POLITICS* 397 (1980).

